

Liggett Group Inc.

West Main & Fuller Streets, Durham, N.C. 27702

Liggett

Law Department

April 7, 1983

PRIVILEGED AND CONFIDENTIAL

Mr. Robert B. Seidensticker  
Group Vice President - Tobacco Companies  
GrandMet USA, Inc.  
100 Paragon Drive  
Montvale, New Jersey 07645

RE: Committee of Counsel  
Meeting of 3.31.83


Dear Bob:

In keeping with our telephone conference of this morning, I hasten to forward to you, by enclosure herewith, a copy of my memorandum which addresses itself, in itemized fashion, to the several matters which were reviewed at the Committee of Counsel meeting held in New York on March 31 past.

If additional particulars of information are needed, please advise.

With best personal regards, I am

Yours very truly,

  
Josiah S. Murray, III  
Special Counsel

JSM,III:hb  
Enclosure

cc(w/e): Mr. K. v. Dey, Jr.  
✓ Mr. J. H. Greer  
Mr. R. W. Hooker, Jr.

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TO: X. v. R. Dey, Jr.  
J. H. Greer  
R. W. Hooker, Jr.  
R. B. Seidensticker

FROM: Josiah S. Murray, III

SUBJECT: Committee of Counsel Meeting of 3.31.83  
Offices of Lorillard; NYC

At the direction of Joseph H. Greer, the undersigned attended the meeting of the Committee of Counsel held at the offices of Lorillard in New York City on 3.31.83. Present and attending were the following:

Stevens (Presiding):	Lorillard
Cherry:	Lorillard
Murray:	Liggett
Decker:	Webster/Sheffield
Witt:	RJR
Jacob:	Jacob, Medinger, et al
Finnegan:	Jacob, Medinger, et al
Crohn:	Jacob, Medinger, et al
Bezanson:	Chadbourne, et al
Brown:	Chadbourne, et al
Chapin:	U. S. Tobacco
Shinn:	Shook, Hardy & Bacon
Wall:	Shook, Hardy & Bacon
Kornegay:	Tobacco Institute
Chilcote:	Tobacco Institute
Ehrensfield:	PM
Holtzman:	PM
Newman:	PM
Pepples:	B&W

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Temko:  
Rupp:

C&B  
C&B

The agenda items which were considered and discussed and the action or actions taken with respect to each are as follows:

1. Legislative Update-I:

(a) Warning Notice.

Horace Kornegay of The Tobacco Institute gave a brief report as to the Waxman Committee hearings held during March, 1983. Kornegay reported that the hearing scheduled to be held before the Hatch Committee is scheduled for April 25 coming, with only two hours allocated for taking witness testimony from four separate panels. After some discussion as to the advantages and disadvantages which might result from any postponement of the scheduled Hatch Committee hearing, a consensus was reached that any delay, if such became a possibility, would be to the advantage of the industry, and if such became a possibility, the proposal for a continuance of the hearing date should not be opposed.

An extended discussion thereafter followed which focused upon the possibility of the Hatch Committee making inquiry of the tobacco industry as to its position - if any there be - in the event of a congressional proposal to delete the statutorily mandated warning label. After an exhaustive exchange of views expressed by several of the attending Committee members, there was a consensus of opinion to the effect that the position to be taken by Mr. Curtis H. Judge and Arthur J. Stevens, Esq. - speaking on behalf of the industry - in response to any such question so put would be as follows:

- (1) That the industry does not consider the hypothetical inquiry to be a serious one since there is an absence of any pending legislation which would effectuate such a repeal;
- (2) That if the hypothetical inquiry is in fact a serious one, the position of the industry is as it always has been: that it is opposed to the warning notice (with particulars to be given by the witness or witnesses to corroborate such position of opposition taken prior to the enactment of the warning notice legislation);
- (3) That the reason for such opposition is that the noticed health hazard is not and never has been supported by scientific evidence; and
- (4) That the industry would (and does) favor a repeal of the warning notice legislation.

The consensus of opinion which emerged and which resulted in the above proposed statement of position to be taken in the event any such hypothetical question is so posed was predicated upon the underlying assumption - an assumption acknowledged by all as being shared by all without exception - that the warning notice legislation would not in fact in any event be repealed.

\* \* \*

Although the subject did not appear on the published agenda as a matter to be considered, Stevens broached the question of the position to be taken by Judge and Stevens of Lorillard, for and on behalf of the industry, in the event of any inquiry by the Committee as to - arguably possibly - the possible circumvention of the FTC Consent Judgment bar to broadcast promotion of tobacco products via tobacco company endorsement and support of certain events (sports tournaments and music festivals and events of like type) which attract broadcast media coverage and result in the attendant though indirect publication through radio and television coverage of brand names. The possibility of such a question being so posed by the Hatch Committee presented substantial difficulty to certain of the counsel in attendance, especially for Stevens of Lorillard, for reason that: a) Judge and Stevens of Lorillard act as spokesmen for the industry before the Committee (Stevens of Lorillard presently chairing the Committee of Counsel), and b) for such reason Judge/Stevens - to the extent consistent with intellectual honesty - must take a position not adverse to the industry as a whole, although c) certain of the individual companies adhere to rather dark views as to the propriety of such activities. After considerable dialogue - somewhat confrontative on occasion - Stevens announced that the position to be taken by Judge in response to any such question so put would be essentially as follows:

- (1) That Lorillard would not comment on the motives of any other company which engaged in any such promotion, such being an area of competitive decision-making, and
- (2) Lorillard itself was "doing other things" as far as its own marketing and advertising efforts.

\* \* \*

(b) Self-Extinguishing.

Kornegay of TI opened the discussion of this subject, making reference to his letter of 3.22.83 forwarded to General Counsel to each of the several companies. Kornegay stated that the subject of self-extinguishing smoking products as discussed and brought forward before the Waxman Committee involved, inter alia, three considerations, to-wit:

- (1) Whether the suggested or proposed legislation will take the form of a "study bill";

- (2) Whether any such legislation if so enacted would be preemptive so as to preclude state legislation in the area; and,
- (3) The possible submission by the various companies or the industry as a whole of research data heretofore collected and assembled.

Kornegay stated that he was (and is) of the understanding that the position of the industry was (and is) [and that he so took a position at the hearing before the Waxman Committee]: 1) that the industry is concerned, and all companies are of one mind in sharing such a concern; 2) that the industry is trying and wants to contribute to a solution to the problem; 3) that the industry is trying to reduce the ignition potential of smoking products with each company working independently; 4) that no technologically feasible answer is available to the problem at the present time; and 5) that the industry is cooperating with the furniture industry in attempting to minimize, reduce or eliminate the problem.

In briefing the Committee of Counsel as to his testimony given before the Waxman Committee, Kornegay went on to inform the Committee of Counsel that he had testified to the effect that if such technology became available and feasible, that such, in his opinion, would "... certainly be shared with all of the manufacturers in the public interest". [Page 147 of the transcript of the hearings before the Waxman Committee]. The tenor of the comments given by several of the Committee members in attendance in reaction to this statement by Kornegay made it self-evident that there was an absence of any agreement - tacit or otherwise - among the several companies in this critical area.

Witt of RJR then posed the pivotal question: Should the industry avail itself of the possibility of a "study proposal" bill if the Hatch Committee suggests that such is a possibility? Chilcote of TI recommend that:

- (1) Data be submitted by the industry or by the several companies, and
- (2) The industry endorse a "study bill" with state preemption.

Stevens of Lorillard voiced the opinion that the companies are going to have to give "some data" (non-proprietary information) to support its witness (Dr. Spears). In answer to question put, Chilcote of TI voiced the opinion that no state bill would be passed (at this time) even in the absence of the enactment of a federal statute. Rupp of Covington & Burling opined that only four states of the ten or eleven states considering state legislation appeared to be possibilities for state legislation at this point in time, with the State of New

York being the most difficult situation. On question, Kornegay expressed the unequivocal opinion that some type of congressional legislation in this area could not be defeated in any event. Stevens expressed his own strongly-felt opinion that the industry must do "something" as far as submission of data - otherwise, all of the options which might otherwise be available would be removed, and that no one is better equipped to do so than Representative Waxman. Pepples expressed his own personal concern that adoption of a "study bill" would, in all likelihood, result in a product modification - a concern apparently shared by Stevens. Pepples suggested consideration of an inter-company effort under an anti-trust exception, but Kornegay was of the opinion that any such effort at this time would be and is too late.

After considerable additional discussion by and among several of those in attendance, differing approaches or recommendations were advanced by Jacobs (outside counsel to RJR), by Pepples of B&W, and by Stevens of Lorillard, these being:

- Jacobs: (1) A "study bill", but with industry financing in major part;  
(2) Industry participation in cooperation with government effort;  
(3) Possible participation to put the correct imprimatur on the resultant (in all probability) T&N increases.
- Pepples: (1) Industry financed study at no expense to government;  
(2) Retain the most highly qualified outside/independent technical experts;  
(3) A voluntary program not mandated by legislative enactment; and  
(4) Submission of company data.
- Stevens: (1) Those companies which are so willing to submit data "properly packaged" to the congressional committee(s) with confidentiality protected as best possible;  
(2) Committee(s) to engage such consultants as it (they) desire(s) (desire) to evaluate the data so submitted;  
(3) Defer any legislation until such time as all such data so submitted has been evaluated.

Holtzman of PM thinks that "bargaining" with the congressional committees should continue, and that a bill is inevitable in any event. Temko of Covington & Burling was of the opinion that work should proceed on the drafting of a proposed bill (drafting by counsel to TI), with a tender of company research personnel to the committees without necessarily a tender of all company compiled research data.

After reflection upon all of the opinions offered at the meeting, a consensus decision was made as follows:

- (i) Counsel to TI (Rupp, et al of Covington & Burling) would draft a proposed bill;
  - (ii) The proposed bill as drafted by counsel to TI would be submitted to the several companies for their review and critique;
  - (iii) Assuming agreement as to the content of the proposed bill, Kornegay of TI to submit the proposed bill to the congressional committees in question.
2. LS, INC.: (Legal Services Corporation for Cigarette Industry Litigation Support).

There was unanimous approval to proceed with the implementation of LS, Inc., the organization of this corporation having been the subject matter of extensive study, review and evaluation for a considerable period of time heretofore. Funding of LS, Inc. is reflected by the budget incorporated in the formal "Report to the Committee of Counsel Regarding LS, Inc.", dated February 28, 1983, a copy of same having been transmitted by Decker to Greer with cover letter of 3.1.83. It was agreed that a status report on the progress of implementation would be given at the 5.18.83 meeting of Committee of Counsel.

3. Sampling Legislation:

This subject previously had been assigned to Witt of RJR for reporting, but Witt informed the Committee that he was not in a position to report at this time. Temko reported that the ordinance under consideration in Philadelphia remained an active legislative matter for that municipality, but that action on the proposed ordinance has been deferred a number of times. Witt informed the Committee that he would collect and assemble current information on the Philadelphia situation and would re-circulate same by mail to the several Committee of Counsel members. Stevens suggested that this matter be left with Witt, with a suggestion that Witt consider drafting a proposed ordinance to submit for consideration in lieu of the draft ordinance now being considered.

4. HHS Ingredients:

This was not discussed in any significant way other than a brief comment by Temko to the effect that at some near point in time counsel need to address themselves to the matter and to project the future course of the inquiry.

5. MRFIT:

The "MRFIT" proposed advertisement had been prepared and developed by the staff of TI pursuant to a request from the Executive Committee. Pepples of B&W spoke at length and in eloquent fashion in opposition to the proposed advertisement. Pepples opined that publication of the proposed ad with a warning notice would be completely ineffective for reason of the self-contradiction on the face of same. If the proposed "MRFIT" advertisement is to be published without the warning notice appearing thereon, three attendant areas of concern, of necessity, must be considered:

- (1) The question of product liability;
- (2) The question of health assurance; and,
- (3) The question of possible violation of the FTC Consent Decree.

Pepples further voiced his opinion to the effect that if the ad is run, publication of such in and of itself might well be actionable; if not, publication of same would, as a minimum, expose the industry to attack, and it would place the industry in the forbidden area of contending for positive health benefits from smoking. A worse case scenario would be an FTC judicial proceeding seeking injunctive relief which ultimately succeeded.

Temko was supportive of the position taken by Pepples and was of the opinion that publication of the proposed advertisement without the warning notice was not simply a theoretical danger, but presented a probability of serious legal problems, e.g.: a violation of the Consent FTC Judgment with injunctive relief being sought by the FTC, together with possible criminal sanctions.

Following the comments by Pepples and Temko, a consensus was reached to the effect that each attorney should discuss the matter with their respective companies, and that the proposed advertisement should not be published without the warning notice appearing thereon. The subject matter is to be considered again, it is understood, by the Executive Committee at its next regularly-scheduled meeting.

6. CTR - Tax Credits:

Witt of RJR brought to the attention of the Committee of Counsel that RJR was considering making direct-payment research grants to certain qualified research institutions rather than through the Counsel for Tobacco Research for reason of possible beneficial tax credits which would be available. Witt made inquiry as to whether other companies would have any objection to RJR so proceeding since such apparently is allowed under the Code. It was agreed that any company which had any concern would have its tax counsel communicate directly with tax counsel to RJR



with a view to reaching some mutually satisfactory resolution of the problem.

7. Legislative Update-II:

Discussion was brief and centered upon the current status of the proposed Kasten bill in Congress. Hearings are calendared for 4.6.83 and 4.28.83, with Senator Holland being opposed to the bill. Crohn of J,M et al reported that the two sections which are of concern involve §5 (design defect) and §6 (failure to warn). It was reported that the litigation section of the ABA is against the bill.

8. FTC Working Paper #76:

Discussion was brief, with Stevens offering the comment that the paper was somewhat out-dated when first published, although the paper is of some help to the industry in providing a rebuttal argument to the "addiction" issue. Shinn offered a comment that the paper was not of particular importance at this time, but should be kept in mind for possible future use.

9. Smoking in the Workplace:

Chilcote of TI spoke to this subject, and reported that material would be distributed to the several counsel members in the near future. Stevens invited the attention of the Committee members to the 1.12.83 report.

10. ASHRAE/BOCA:

Newman of PM reported on this subject and he expressed the opinion that it was a serious matter and presented a new battleground for the industry. The problem at hand is that ASHRAE standards require different ventilation specifications for smoking areas as opposed to non-smoking areas, although the standards as now drafted are in the process of being re-formulated. The critical concern is that any adoption of the ASHRAE standards in the Model Building Code would, in all probability, result in more "non-smoking buildings" being constructed in the future rather than "smoking buildings" for reason of the cost differential. Newman made the suggestion that the TI staff continue working on the matter, with Newman and Rupp to be a sub-committee of two with Newman-Rupp to report to the Committee of Counsel at the next meeting.

11. Update on Litigation:

(a) Lee v. Massachusetts Department of Public Welfare.

There was a telephone report of 3.31.83 to the effect that this case came on for hearing before the Court on 3.31.83 for dismissal on the pleadings, based upon the defendant's affirmative defenses of: (i) sovereign immunity, and (ii) statute

of limitations. As of 3.31.83, no ruling had been entered by the Court. It is reported that there is no prospect of settlement.

(b) Other.

Decker reported to the Committee as to the recent commencement of the Mansfield case against Liggett, et al in New Jersey. Jacobs brought to the attention of the Committee information he had received to the effect that a class action of some thirty (30) plaintiffs is to be brought against all of the several tobacco companies as defendants. No particulars of information are available at this time.

12. Pending Special Project Approvals:

There was no discussion on this subject other than a request from Shinn to the effect that Liggett needs to respond to the Washington University item. JSM to confer with Greer.

13. California - Product Liability Legislation:

A bill has been introduced in the California legislature to overturn the Sindell decision subject to certain exceptions. It was reported that the pharmaceutical industry has not been organized in support of the bill, and a contribution from the tobacco industry is desired. It was indicated that B&W was supporting such as well as PM, and that Lorillard, although considering the matter, was unlikely to support.

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Meeting adjourned at 4:15 P.M. Next meeting of Committee of Counsel scheduled for 5.18.83 at the TI in Washington.

JSM,III:hb

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